BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554



| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Tariff Filing Requirements for Nondominant Common Carriers** | ) | **CC Docket No. 93-36** |

**To: The Commission**

## COMMENTS IN SUPPORT OF PETITION FOR PARTIAL RECONSIDERATION

The American Petroleum Institute ("API"), by its attorneys, hereby submits its Comments in Support of the Petition for Partial Reconsideration submitted by the Ad Hoc Telecommunications Committee ("Reconsideration Petition") in response to the Memorandum Opinion and Order ("MO&O") adopted on August 16, 1993.[1/]

## I. STATEMENT OF INTEREST

API is a national trade association representing over 200 companies involved in all aspects of the oil and gas industries, including exploration, production, refining, marketing and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as a spokesperson before

---

1/ Ad Hoc submitted its Petition for Partial Reconsideration on September 22, 1993. Report No. 1977, October 7, 1993. 58 Fed. Reg. 53204 (October 14, 1993).

federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organizations's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries.

API member companies negotiate long-term service arrangements with the major facilities-based interexchange telecommunications common carriers: AT&T, MCI, Sprint and WilTel. All of these carriers except AT&T are classified as nondominant carriers. In the MO&O, the Commission declined to establish procedures and substantive standards to limit the authority of nondominant common carriers to abrogate unilaterally these term agreements. Inasmuch as member companies are adversely affected by this decision, API submits this Statement in Support of the Reconsideration Petition, urging that the Federal Communications Commission ("Commission" or "FCC") grant this petition.

## II. DISCUSSION

In most respects, the MO&O reflects both the Commission's thoughtful exercise of its "elastic powers . . . [to] accommodate dynamic new developments in the

field of telecommunications," General Telephone Co. v. United States, 449 F. 2d 846, 853 (5th Cir. 1971), and the Commission's commitment to adaptive regulation which the courts have endorsed and affirmed on numerous occasions.[2/] Unfortunately, the MO&O's response to users' requests for reasonable protections against the ability of nondominant carriers to abrogate long-term agreements[3/] constitutes arbitrary and capricious agency action.

As the Reconsideration Petition explains, substantial, if not complete, reliance on the marketplace in regulating nondominant carriers with regard to customer-specific arrangements warrants greater reliance on conventional commercial legal principles, principally the mutual enforceability of the agreements governing these long-term arrangements. The Commission's dismissal of user proposals on this matter is particularly disturbing, when, almost

---

2/ See, e.g., Washington Util. and Transp. Comm'n v. FCC, 513 F. 2d 1142, cert. denied, 423 U.S. 836 (1975):

> The Commission's authority is stated broadly to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry. Regulatory practices and policies that will serve the "public interest" today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future.

Id. at 1157.

3/ See MO&O, Paragraph 25.

concurrent with the adoption of the MO&O, the Commission prepared and filed a petition for a writ of certiorari with the Supreme Court seeking judicial affirmation of its permissive tariff filing policy on the theory that tariffs are inimical to competition in today's telecommunications market.[4/] If the tariff filing obligation so offends the Commission's assessment regarding the efficient operation of the telecommunications marketplace, how can the Commission continue to accord nondominant carriers the unfettered legal discretion to abrogate their long term agreements concluded in that marketplace?

The Reconsideration Petition discusses the role of enforceable agreements in enhancing the efficient operation of markets.[5/] While important for purposes of the "administrative record" in this proceeding, the need to restate such a widely shared, if implicit, concept is particularly disturbing for users. This concept should be part and parcel of the Commission's current regulatory scheme. Thus, the Reconsideration Petition requests only fundamental "procedural and substantive mechanisms" to

---

4/ FCC v. AT&T, petition for cert. filed (October 1993) (No. 93-521), pp. 14-18.

5/ Reconsideration Petition, pp. 6-7.

promote the enforceability of carrier obligations and commitments.[6/]

API submits that maximizing the enforceability of term agreements will enhance the Commission's pro-competitive regulatory policies. The Commission is undoubtedly aware of the arduous undercharge litigation engulfing the motor

---

6/ Consistent with the intent and purpose of the abbreviated tariff amendment notice period, the Reconsideration Petition proposes the following safeguards with respect to carrier initiated tariffs which alter the terms of one or more existing long-term agreement:

- All affected customers should be given at least fifteen days' advance notice of the filing.
- The carrier should be required to identify in its filing the changes to long-term arrangements that it seeks to make, and should state what it believes constitutes substantial cause for such changes.
- The filing should be made with a lengthened notice period. The Ad Hoc Committee recommended forty-five days; others, such as TCA (Comments at 7), proposed a full 120 days.
- The Commission should, as a matter of course, suspend and investigate all such filings. The Commission should also use the rejection mechanism where the purported substantial cause justification is missing, is inadequate on its face or is conclusively refuted in petitions opposing the filing.
- In the event that, notwithstanding the above, such a filing ultimately becomes effective, any affected customer should have the absolute right to terminate its commitment with no liability whatever.

Reconsideration Petition, p. 9.

carrier industry. In large part, this litigation is the unintended consequence of the Interstate Commerce Commission's failure to reconcile the new ways shippers and carriers were transacting business in the increasingly competitive motor carrier industry with the operative principles of the Interstate Commerce Act. Shippers and trustees of bankrupt motor carriers continue to litigate ad nauseam the implications of the filed rate doctrine.[1/] While the MO&O formulates rules to comply with the legal requirement for communications common carriers to file tariffs and provide service consistent with those tariffs, it leaves users in the untenable position of having their negotiated agreements abrogated by a subsequently filed tariff, thereby missing the essential lesson of the motor carrier undercharge litigation: the dealings between regulated carriers and their customers are ultimately governed by a statute whose core principles must be recognized and accommodated, despite "changed circumstances."

The MO&O's response to the user community that the Commission is "prepared to resolve issues regarding the

---

[1/] See generally, Comments of Mobile Marine Radio, Inc. C.C. Docket No. 93-36, filed on March 29, 1993, p. 7, n. 5, (highlighting the nature of this undercharge litigation, the total dollar amount of which is valued at over $30 billion).

liability of users" [when carriers abrogate agreed to and effective tariffs or agreements through tariff amendments] on "a case by case basis" is not reassuring. The "black letter law" of American Broadcasting Company, Inc. v. FCC, 643 F. 2d 818 (D.C. Cir. 1980) is that users must take service pursuant to the currently effective agreement. The Commission's response is also inadequate because it does not provide long-term customers of nondominant carriers with the basic remedy of termination without liability. While there are limits to this "self-help" option, its import is substantial. The service provider recognizes its customer has an immediate, self-executing remedy for the carrier's breach of its agreement. As compared to costly and time consuming "case by case" litigation, the right to terminate can be far more valuable.[8/]

---

[8/] The value of a meaningful self-help remedy as a counter-weight to the carrier's ability to "alter the bargain" is as obvious to carriers as it is to their customers. Since its inception, AT&T has provided VTNS customers the right to discontinue service without liability, if without the customer's prior agreement, AT&T files a tariff inconsistent with the agreed upon terms and condition in the customer's VTNS Option. See AT&T, Transmittal No. 1018, September 22, 1987, Original Page 43Nx, Section 7.2.4.A., Discontinuance of VTNS Without Termination Liability. AT&T recognized the importance of providing users with a self-help remedy. Id., Description and Justification, p. 17 ("This regulation is reasonable because it protects customers of this multi-year service from changes in the terms and conditions of the service they ordered.")

The MO&O is also significantly flawed in suggesting "that large telecommunications users that usually negotiate such long-term service arrangements possess sufficient leverage in the market to discourage nondominant carriers from choosing a course of conduct harmful to the users' interests."[9/] There is no basis in fact to assume that individual customers have "sufficient leverage" over these carriers. MCI and Sprint are multibillion dollar corporations. MCI's revenues exceeded $10.5 billion in 1992; Sprint's combined revenues for local and long distance service also surpassed $10 billion dollars in 1992.[10/] Moreover, MCI is now part-owned by British Telecom. As such, Sprint and MCI are comparable in size with, if not larger than, many of the firms with whom they enter into long-term agreements.

The procedural and substantive mechanisms set out in the Reconsideration Petition synthesize the views advanced by the user community.[11/] There is no intention of interfering with the procompetitive purposes of the

---

9/ Id. at Para. 25.

10/ See Motion for Reclassification of American Telephone and Telegraph Company as a Nondominant Carrier, CC Docket No. 72-252, filed September 22, 1993, pp. 9-11 (citing the 1992 Annual Reports of Sprint and MCI respectively).

11/ See MO&O, Para. 20.

abbreviated notice period. Nondominant carriers should have the flexibility envisioned by the Commission in responding in a competitive environment. What the user community is advocating is a reasonable balancing of the legal as well as the economic risks associated with customer-specific arrangements.

API urges the Commission to take one further step and implement a proposal offered originally by the Tele-Communications Association that the Commission declare unlawful, pursuant to Sections 201(b) and 205 of the Act, tariff filings having the effect of abrogating carrier commitments not to modify the rates, terms and conditions expressed in either a long term contract or tariff. This ruling and the "absolute right" to terminate an arrangement where a subsequently filed tariff takes effect and abrogates a substantial rate, term or condition will maximize the operation of regulatory policies based on marketplace competition. In this manner, the Commission effectively will extend and apply the "substantial cause" test[12/] to dealings between nondominant carriers and users.

**WHEREFORE THE PREMISES CONSIDERED**, the American Petroleum Institute respectfully requests that the Federal

---

12/ See RCA American Communications, Inc. 84 F.C.C. 2d 353 (1980); investigation 86 F.C.C. 2d 1197 (1981); on remand 94 F.C.C. 2d 1338 (1983).

Communications Commission grant the Reconsideration Petition and take all other action consistent with the views expressed herein.

Respectfully submitted,

**The American Petroleum Institute**

By: C. Douglas Jarrett

Wayne V. Black
C. Douglas Jarrett

Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: October 29, 1993

## CERTIFICATE OF SERVICE

I, Joyce A. Bazzle, a secretary in the law firm of Keller and Heckman, do hereby certify that a copy of the foregoing COMMENTS IN SUPPORT OF PETITION FOR PARTIAL RECONSIDERATION has been served this 29th day of October, 1993 by mailing U.S. First-Class postage prepaid, to the following:

James S. Blaszak, Esq.
Patrick J. Whittle, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Jeffrey Linder, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Joyce Bazzle

Joyce A. Bazzle